In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 794

O. A. CARGILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 381 F. 2d 849.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1967 (Pet. App. 10). A petition for rehearing was denied on September 7, 1967 (Pet. App. 10). On September 27, 1967, Mr. Justice White extended the time for the filing of a petition for a writ of certiorari to and including November 6, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

284-646—67

QUESTIONS PRESENTED

1. Whether, having reversed petitioner's convictions on two counts of perjury because the trial judge failed to turn over the grand jury testimony of a government witness whose trial testimony related to those two counts, the court of appeals should have also reversed petitioner's conviction on a third perjury count even though that count was fully supported by other evidence.

2. Whether a defendant convicted of having committed perjury before a grand jury may challenge his conviction on the ground that the grand jury acted improperly in calling him as a witness.

3. Whether the trial judge abused his discretion by denying petitioner's pre-trial request for a continuance on the ground of prejudicial publicity.

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on each count of a three-count indictment charging perjury before a federal grand jury, in violation of 18 U.S.C. 1621 (1 R. 14–17; VIII R. 1374–1375). On July 28, 1965, he was given concurrent sentences of five years' imprisonment and $1,000 fines on each count (1 R. 125–126). The court of appeals reversed the convictions on Counts One and Two but affirmed as to Count Three (Pet. App. 1–9; 384 F. 2d 349).

[1] "R." preceded by volume number refers to the multi-volumed transcript of record before the court of appeals which is now on file with the Clerk of this Court.

1. On April 7, 1964, petitioner, who was a practicing attorney, was called as a witness before a federal grand jury which was investigating allegations that certain Justices of the Supreme Court of Oklahoma had received income from bribes and other sources which they had failed to report on their federal income tax returns (II R. 321, 326, 329, 332, 335). The indictment alleged that in his testimony before the grand jury on that date petitioner committed perjury in that he denied having "the slightest idea" of what had happened to $150,000 that one Hugh Carroll had withdrawn from Selected Investments Corporation and had allegedly given to one "Pierre Laval" (Count 1), or who this "Pierre Laval" was (Count 2) (I R. 14–16; VIII R. 1410–1411); and that he falsely stated that he never had any "financial transactions" with any Justices of the Oklahoma Supreme Court (Count 3) (I R. 16–17).

2. The government's evidence, the sufficiency of which is not in dispute, showed the following:

Counts 1 and 2: In March 1957, Oklahoma Supreme Court Justice Corn agreed with Hugh Carroll to assist in obtaining reversal of a $560,000 State tax-assessment imposed on Selected Investments Corporation of which Carroll was president and major stockholder, and Carroll agreed to pay Corn $150,000. In the spring of 1957, after the Oklahoma Supreme Court had reversed the assessment, Carroll paid Justice Corn $150,000 out of the corporate funds of Selected (III R. 341–348). In early 1958, Carroll advised petitioner, who was then his lawyer, of the $150,000 payment to Justice Corn, and petitioner responded that "he

wished he had known about it, he could have handled it for less" (III R. 251-350). When, in March 1958, it became necessary for Carroll to testify at a bankruptcy hearing involving Selected, petitioner suggested that Carroll make up a fictitious story to account for the $150,000 that had been paid to Justice Corn, and together they concocted the explanation that Carroll had given the $150,000 in corporate funds to a "Pierre Laval, who was supposed to be a broker from Montreal, Canada," in connection with an "oil transaction" (III R. 252-353; 463-464).[2]

Count 3: The government's evidence established four discrete "financial transactions" between petitioner and Oklahoma Supreme Court Justices. One was petitioner's receipt of a $2,500 fee from Justice Corn for petitioner's assistance in getting Justice Carlisle to agree to the reversal in the Selected Investments tax-assessment case. A second transaction involved the payment of $1,000 by petitioner to Justice Corn, each time the latter ran for re-election, in exchange for which Justice Corn agreed to vote as petitioner's "sixth man" in those cases where petitioner already had a majority of the 9-member Oklahoma Supreme Court (IV R. 504-506, 510-511, 543-544, 679-681, 692-693, 702, 712, 713). A third transaction involved the payment of $30,000 to petitioner by

[2] Justice Corn confirmed Carroll's testimony concerning the $150,000 transaction (IV R. 510, 695). The Justice further testified that he had told petitioner he would give him $2,500 if he could get Supreme Court Justice Carlisle to agree to the reversal on the Selected tax-assessment case. A few days later, after petitioner advised Corn that the matter had been taken care of, the Justice gave him $2,500 (IV R. 510-511).

one Henry Marshall (whom petitioner had represented in several legal matters (V R. 723-725)) in connection with a case (*Marshall* v. *Amos*) which petitioner said Marshall would lose if he "didn't take care of the boys on the hill" (V R. 754, 811). Justice Corn testified that he received $4,000 from petitioner for a favorable decision in that case (IV R. 506-510, 701). The final transaction related to petitioner's payment of $7,500 to Justice Corn to gain reversal in another pending case (*Oklahoma Company* v. *O'Neil*) in which petitioner was interested. Justice Corn delivered $5,000 of that amount to two other Supreme Court Justices (IV R. 513-515, 665, 700).

ARGUMENT

1. The court of appeals reversed petitioner's conviction on counts one and two of the indictment, finding error in the trial court's refusal to grant the defense's request for the grand jury testimony of government witness Hugh Carroll.[3] The court held that, under *Dennis* v. *United States*, 384 U.S. 855, production of grand jury testimony is required at trial whenever defense counsel desires "to use the transcript for the purpose of impeaching a witness, to refresh his recollection, or to test his credibility" (381 F. 2d at 851). In so ruling, the court below construed

[3] Prior to trial, the district court had granted petitioner's request for his own grand jury testimony, but not that of other potential witnesses, including Carroll (I R. 35-37, 41). At the start of Carroll's cross-examination, the court denied the defense request for his grand jury testimony (III R. 356-357, 360). Subsequently, the trial judge read the testimony himself and found "no occasion for changing any ruling." (III R. 466).

Dennis liberally, establishing a rule for the Tenth Circuit which will make production of grand jury minutes of the witness the rule rather than the exception. (See *National Dairy Products Corp.* v. *United States*, C.A. 8, No. 18, 737, decided October 27, 1967.) Moreover, since the district court's denial of the request for grand jury minutes occurred prior to this Court's decision in *Dennis*, there is little reason to expect that the questions presented here will have substantial impact on future litigation. Additionally, the determination by the court below that the failure to turn over Carroll's grand-jury testimony did not affect count 3 of this indictment involves a specific factual evaluation of the evidence in this case which is fairly supported by the record. In short, this case presents no issue warranting further review.

The proof as to count 3 rested primarily on the testimony of Justice Corn, which was corroborated by other witnesses (see Pet. App. 8a). Justice Corn's testimony that he received $4,000 for his vote in the case of *Marshall* v. *Amos* was corroborated by the testimony of Marshall that he paid petitioner $30,000 to take care of "the boys on the hill," as well as by certain documents reflecting that Marshall had hired petitioner to represent him in connection with the case for a contingent fee of $30,000 (PX–13, 14, 17, 18; VIII R 1427, 1428 and 1430) and the testimony of the lawyer who actually briefed and argued the case for Marshall in the court of appeals (for a fee of $2,000) that petitioner had nothing to do with the handling of the case (VI R. 956–959). The only testimony of Carroll at all relevant to Count III—

that when he told petitioner of the $150,000 bribe in the Selected Investment's case petitioner said "he could have handled it for less"[4]—was insignificant when compared to the substantial and detailed evidence proving that petitioner lied when he denied having financial transactions with members of the Oklahoma Supreme Court. We submit that in these circumstances the court below was warranted in concluding that petitioner's conviction on Count 3 was not adversely affected by the fact that Carroll's grand-jury testimony was not available for use during his cross-examination.[5]

2. There is no occasion in this case to reach the issue whether a prospective defendant may be subpoenaed before a grand jury which suspects him of criminality, and, if so, what consequences flow from the failure to advise him of his suspect status, of his right to counsel and his privilege against self-incrimination (Pet. 14–16). Petitioner was not the target of the grand jury investigation at the time he was subpoenaed to testify.[6]

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[4] It is clear from Carroll's trial testimony that, except for this statement by petitioner, he had no knowledge of petitioner's dealings with the members of the State court. Although petitioner did receive $2,500 from Justice Corn for his help in securing the vote of another Justice in the Selected Investment's case, Carroll did not know of this transaction. (See IV R. 510, 511; III R. 351.)

[5] Although petitioner's present counsel contend that the failure to produce Carroll's testimony significantly affected the conviction on Count 3, it is interesting to note that no such claim was urged in the petition for rehearing in the court below. (A copy of the petition for rehearing is on file with this Court.)

[6] Both petitioner and witness Hugh Carroll were subpoenaed to testify before the April 1964 grand jury (petitioner on April

Moreover, one who commits perjury in testimony before a grand jury may not be heard to claim that illegality in the grand jury process excused his affirmative and unconcerced falsehoods. *United States* v. *Winter*, 348 F. 2d 204, 208–210 (C.A. 2), certiorari denied, 382 U.S. 955; see also, *United States* v. *Williams*, 341 U.S. 58, 68–69; *Dennis* v. *United States*, 384 U.S. 855, 865–866. This claim rings particularly hollow when made by an experienced attorney. Similarly, the affirmative act of perjury is not excused because the grand jury oath (see II R. 226) imposed a requirement of secrecy as well as one of truthfulness. There is no attempt here to hold petitioner in contempt for violating that pledge of secrecy. Cf. *Bowman Dairy Company* v. *United States*, 341 U.S. 214, 221.

3. Petitioner has failed to show that pre-trial publicity prejudiced him. The publicity related to the judges (see Pet. 9). The *voir dire* revealed no juror who had any preconceived notions as to petitioner's

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7 and Carroll on April 6) in connection with the grand jury's investigation of whether certain Oklahoma Supreme Court Justices had received bribes which they had failed to report on their federal income tax returns (II R. 326–329, 332, 335). On April 8, 1964, Justices Corn and Welch were indicted by that grand jury for federal income tax violations (II R. 335; see IX R. 1440–1442). Petitioner was not indicted by the April 1964 grand jury before which he appeared, nor was he indicted at two later sessions of this grand jury (VIII R. 1395). It was not until December 9, 1964, that petitioner first became the target of investigation and prosecution. On that date Justice Corn, at the Medical Center for Federal Prisoners, Springfield, Missouri, gave a statement before a court reporter, which, when taken with earlier testimony of Carroll on April 6, 1964, showed that $150,000 had been paid by Carroll to Corn, and that Corn had paid petitioner $2,500 (IX R. 1464, 1465). At no time after this was petitioner called to testify before the grand jury.

guilt (see, *e.g.*, II R. 179, 186, 192, 195, 197, 199). Defense counsel, who interrogated the prospective jurors at length, made no challenge for cause. See *Beck* v. *Washington*, 369 U.S. 541. The jury was sequestered during trial (II R. 279). Petitioner has failed to make a showing that, despite these scrupulous safeguards, there was substantial danger that he could not receive a fair trial. See *Beck* v. *Washington*, 369 U.S. 541, 557–558; *Darcy* v. *Handy*, 351 U.S. 454, 462; cf. *Sheppard* v. *Maxwell*, 384 U.S. 333.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[7] *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1) is not apposite. There, a legislative committee of Congress commenced widely publicized public hearings into defendant's conduct, while the defendant was awaiting trial under an indictment based on the same transactions. The court of appeals held that where prejudicial publicity was being engendered by the legislative branch of the federal government the executive branch could not try defendant until such prejudice had been dissipated (see 199 F. 2d at 114–115). Here, the state legislative proceedings were not directed at petitioner.

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